

Amendments to Competition Act 2002: The Way Forward

Seminar Organised by CUTS C-CIER
Saturday 25th February 2006, New Delhi

Discussion Note

About Competition Law

Competition is a process of economic rivalry between market players to attract customers. These market players can be multinational or domestic companies, wholesalers, retailers (even our neighbourhood shopkeepers or a cable operator). Competitive market ensures efficiency resulting in best possible choice of quality, lowest prices and adequate supplies to consumers.

Anyhow, firms, while competing with one another, often adopt unfair means to restrict competition. This relates to fixing prices with rivals, setting price which is lower than cost in order to throw out competitors from market, taking advantage of a monopoly position and charging unreasonable price, and the like. Competition law, therefore, is intended to put a check on restrictive or unfair business practices by firms in the market.

Box 1. Why a Competition Law?

The need for a competition law arises from the following factors:

- To take care of anti-competitive practices adopted by firms to restrict the free play of competition in the market
- To take care of unfair means adopted by firms against consumers and other market players to extract maximum possible benefits
- To maintain and promote competitive spirit in the market

From MRTP Act To Competition Act

The history of the Indian competition legislation goes back to the Monopolies Inquiries Commission (1965), which had uncovered strong concentration of economic power in various sectors of the economy. Consequently, the Monopolies & Restrictive Trade Practices Act (MRTP Act) was enacted in 1969 to prevent concentration of economic power, control monopolies, and prohibit monopolistic and restrictive trade practices. Unfair trade practices, a consumer protection provision covering deception, misleading claims etc, was brought in through an amendment in 1984.

However, the MRTP Act was unable to deliver as expected partly because of the inherent weaknesses in its own structure and the composition of the MRTP Commission, and partly due to the fact that the attributes of competition (entry, price, scale, location etc.) were regulated by separate set of policies.

Widespread economic reforms undertaken since 1991 significantly changed the economic environment in the country. Major amendments were made to the MRTP Act in 1991 but even these were considered inadequate, accentuating the need for a new competition law. As a result, Competition Act, 2002 was enacted to replace the MRTP Act.

The Competition Act focuses on four core areas:

- Anti-competitive agreements
- Abuse of dominance
- Combinations regulation (mergers, alliances, etc.)
- Competition advocacy

Why Amendments?

The implementation of the Act, however, ran into problems on account of the composition of the Competition Commission of India (CCI), the competition authority entrusted with the responsibility of implementing the Act. A writ petition filed in the Supreme Court challenged that the CCI envisaged by the Act is more of a judicial body having adjudicatory powers and that in the background of the doctrine of separation of powers recognised by the Indian Constitution, the Chairman of the Commission had necessarily to be a (retired) judge.

Pursuant to this, the Government has proposed to amend the Competition Act 2002. The Competition (Amendment) bill is expected to be tabled in the forthcoming 'budget session' of the Parliament. This note presents key amendments proposed by the government and highlights relevant issues for discussion at the seminar

Existing Provisions vis-à-vis Proposed Amendments

Composition of the CCI

Existing Provision	Amendments Proposed	Issues for Discussion
<ul style="list-style-type: none"> Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government. Chairperson and other members shall be whole time Members (Sec. 8) Chairperson and two other Members of the Selection committee to be nominated by the Central Government The Committee shall devise its own procedure The Committee shall make its recommendations to the Central Government within a period not exceeding 90 days (Selection Rules) 	<ul style="list-style-type: none"> Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government. Chairperson and other members shall be whole time Members Selection committee to be headed by a retired judge of the Supreme Court or the High Court (nominated by the Chief Justice of India); and two other members to be nominated by Central Government. <i>Other selection rules remain unchanged</i> 	<ul style="list-style-type: none"> Should there be a provision to appoint part-time members? <i>(Provision for part time members facilitates involvement of persons, who would otherwise not be available on a whole time basis because of professional commitments. This practice is followed in many countries, including in the TRAI)</i> Should the selection committee be a collegium comprising of Chief Justice of India, finance minister, minister for company affairs, governor of the Reserve Bank of India and cabinet secretary, as suggested by Raghavan Committee (High Level Committee on Competition Policy & Law, 2000). This composition was also specified in Section 9 of the Draft Bill tabled in Parliament in August 2001. Should the selection procedure be clearly defined instead of leaving it at the discretion of the Committee? <i>(Putting a time limit in selecting candidates and not specifying the selection procedure might lead to quick and ineffective methods of selection and quality of persons so appointed could be severely compromised)</i>
<ul style="list-style-type: none"> Age limit for the term of office of the Chairperson restricted to 67 years; and for other Members to 65 years (Sec. 10) 	<ul style="list-style-type: none"> Age limit of Chairperson and other members restricted to 65 years 	<ul style="list-style-type: none"> Should the age limit be brought down? <i>(Age limit of 65 years opens the door for appointment of retired civil servants. This would be contrary to the submission made by Mr. Jaswant Singh, former Finance Minister on 20.12.2002 on the floor of the house that CCI would not be a parking space for retired bureaucrats. A similar view is expressed in the Approach Paper to the 10th Five Year Plan prepared by the Planning Commission of India (Para 4.21)</i>

Interface between CCI and Sector Regulators

Existing Provision	Amendments Proposed	Issues for Discussion
<ul style="list-style-type: none"> Sector regulatory bodies can make a reference to the CCI, when any party before regulatory authority makes such a request On receipt of a reference, CCI will give its opinion, and the regulatory authority shall pass such order as it deems fit (Sec. 21) 	<ul style="list-style-type: none"> Regulatory authorities can also make a <i>suo motu</i> reference to the CCI even without any party before it asking for such a reference On the opinion given by the CCI on such a reference, regulatory authority would have to issue speaking orders 	<ul style="list-style-type: none"> Should consultations between sectoral regulators and the CCI be made 'mandatory' and 'reciprocal'? Should there be a clear demarcation of the respective jurisdictions of the CCI and sectoral regulators in the legislation? <p><i>(Since regulators have to give speaking orders on the opinion given by CCI, they may not have any incentive to refer a matter to CCI in the first place itself, given that reference to CCI is 'voluntary'. In France, sector regulators are empowered to examine structural issues, while competition authority looks at behavioural issues. This includes mandatory consultations as well)</i></p>

Competition Appellate Tribunal

Existing Provision	Amendments Proposed	Issues for Discussion
<ul style="list-style-type: none"> No such provision 	<ul style="list-style-type: none"> Establish a Competition Appellate Tribunal (CAT) to hear appeals against the orders of the CCI and adjudicate compensation claims arising out of the findings of the CCI or orders of the Tribunal. CAT shall consist of a Chairperson and not more than two other members to be appointed by the Central Government on the recommendation of a selection committee headed by the Chief Justice of India. 	<ul style="list-style-type: none"> Should there be a <i>common</i> Appellate Tribunal for CCI and sector regulators, with provisions for regional benches? Should the selection procedure be clearly defined instead of leaving it at the discretion of the Committee? <p><i>(There is often an overlap in the functioning of various regulatory agencies. Setting up an appellate body for each regulatory agency can lead to forum shopping in similar cases, and inconsistent decisions at the appellate level. Further, proliferation of appellate tribunals with not enough workload is an unnecessary burden on the exchequer. As an alternative, it needs to be deliberated if a common appellate tribunal is desirable)</i></p>

Leniency Provision

Existing Provision	Amendments Proposed	Issues for Discussion
<ul style="list-style-type: none"> The Act provides for imposing lesser penalties (i.e. leniency), in case of voluntary disclosure on any cartel formation, to the first party (informer) and before the beginning of the inquiry. (Sec. 46) 	<ul style="list-style-type: none"> Leniency need not be restricted to the first informer and be allowed until the time the Director General submits his report to the CCI. 	<ul style="list-style-type: none"> Should there be a provision to make public, the reasons for granting leniency? Should other cartel members allowed to challenge grant of leniency before CAT? Should leniency be applied only before the initiation of investigation? <p><i>(Allowing leniency during investigations might create an avenue for corruption in the office of the DG. It is, however, argued that clandestine deals with DG's office are less likely if reasons to grant leniency are made public. Corruption is also less likely if other cartel members are allowed to challenge grant of leniency before CAT)</i></p>

Competition Abuses at Local Level

Existing Provision	Amendments Proposed	Issues for Discussion
<ul style="list-style-type: none"> The jurisdiction, powers and authority of the CCI may be exercised by Benches thereof (Sec.22) The CCI, on receipt of a complaint or a reference from a State Government or <i>suo motu</i>, shall direct the DG to investigate the matter. (Sec.26) 	<ul style="list-style-type: none"> Since CCI would now be an expert body, provision of establishing benches for decision making are to be deleted. State governments can also make a reference to the CCI on matters, which are State subjects under the Constitution. 	<ul style="list-style-type: none"> Should there be a provision for establishing regional offices of CCI to keep a check on anti-competitive practices taking place at local level? <p><i>(Considering the huge size of our country and the extent of anti-competitive practices prevalent at local level, implementing the Act from Delhi will not ensure a proper check on local level competition concerns. Several countries around the world (e.g. Spain, Ukraine) provide for establishment of regional offices of their competition authority. In federal countries such as the USA and Australia, provinces also have local competition laws)</i></p>

Box 2: Competition Act vis-à-vis IPR abuses

In India, the IPR laws such as the Patent Act or Copyright Act or Trade Marks Registration Act have over riding powers over the Competition Act in matters related to IPR abuses. For instance, in cases where an anti-competitive outcome arises from the exercise of the rights by the patent holder, the Patent Amendment Act (2005) provides for issue of licenses to stop such anti-competitive activity. However, the role of CCI to examine such matters does not find any mention.

Experiences from other countries reveal that competition law is a useful tool to keep a check on anti-competitive practices such as licensing agreements that restrain marketing and product development. In many countries (e.g. Zimbabwe), competition law has explicit over riding provisions to deal with IPR abuses.

Even, the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) (Article 40) provides flexibility and does not prevent member countries from specifying in their respective legislations, licensing practices or conditions that may in practice constitute abuse of IPRs having an adverse effect on competition in their markets.

- Should the issue of IPRs be covered in further details, clearly specifying procedures for the CCI to investigate cases of IPR abuse?
- Should the Act specify the remedies that are available in case of abuse of IPRs?
- Should the Competition Act override IPR laws in cases of IPR abuses?

Other Issues For Discussion

- Should 'exemptions' from the Act be left at the discretion of the Central Government? Alternatively, should these be exercised publicly and in consultation with the CCI?
- Should the Central Government have discretion in granting money to the CCI? Alternatively, should the Parliament itself approve the budget for the CCI?
- Should policy directives to the CCI be issued only after a wide consultation process?
- Should powers given to the Central Government to supersede the CCI on the grounds for example public interest, etc. be retained or removed?
- Should the CCI be empowered to *suo motu* participate in the formulation of a policy without being invited by the Central or State Governments?

- Is there a need to improve the supervisory role of the Parliament? Should a Parliamentary Standing Committee on Regulation and Competition be constituted as the reporting authority for the CCI and all sector regulatory agencies?